No. 12264

In the United States
COURT OF APPEALS
for the Ninth Circuit

JOHN L. THURSTON,

Libelant-Appellant,

vs.

UNITED STATES OF AMERICA, as represented by the United States Maritime Commission, successors to the War Shipping Administration,

Respondent-Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Oregon.

HENRY L. HESS,
United States Attorney,

FLOYD D. HAMILTON,
Assistant United States Attorney,
Proctors for Appellee, United States of America.

WOOD, MATTHIESSEN & WOOD,

ERSKINE B. WOOD,

1310 Yeon Building,
Portland, Oregon,
Of Counsel for United States of America.

STEVENS-NESS LAW PUB. CO., PORTLAND 9-49

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CASES AND STATUTES CITED

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STATEMENT OF THE CASE

The facts are set forth in the Trial Court's Findings of Fact, and appellee adopts them as a clear statement of the case.

ARGUMENT

Point I

Libelant-Appellant's claim for damages is barred by the two-year limitations period provided in the Suits in Admiralty Act.

Libelant sustained the injury for which this suit was brought on July 10, 1946. He commenced this suit by filing a libel in the District Court on August 4, 1948, more than two years later.

As pointed out in Appellant's brief (page 12) his libel was filed against the United States pursuant to the provisions of the Suits in Admiralty Act, 46 U.S.C.A. §742, 743, 745. The Suits in Admiralty Act provides that all suits, with certain exceptions not here applicable, "shall be brought within two years after the cause of action arises." 46 U.S.C.A. §745. It therefore appears that libelant's claim is time-barred.

Point II

On the merits of the case, the Trial Court's Findings and Conclusions are amply supported by the evidence.

Libelant was the third-assistant engineer, and stood the 8 to 12 watch in the engine room. It was his duty to make frequent inspections of the engine room, and to maintain safe working conditions. He was injured

more than two hours after commencing his watch, when he stepped into an opening in the floor plates, where one of the removable floor plates, frequently removed for the purpose of inspecting and cleaning the screens over the bilge suction lines, was removed. Libelant did not observe that the plate was removed, and stepped into the opening when going to turn on a valve during a routine fire and boat drill.

The Trial Court's Findings of Fact state:

"

IV.

As engineer on watch at the time of his accident, Libelant was the representative of the shipowner in charge of the engine room. He supervised the work of the oilers and firemen under him and who were subject to his orders. It was his duty to make any necessary inspection of the engine room and to maintain a reasonably safe place to work.

V.

The cause of Libelant's injuries was the opening in the floor plates. Libelant, in the discharge of his duty to make necessary inspections of the engine room and maintain a reasonably safe place to work, could and should have discovered this condition. His injuries, therefore, were proximately caused by his own failure to make adequate inspection of the engine room.

VI.

Libelant's injuries did not result from any negligence of Respondent in the discharge of any duty to Libelant, nor from any unseaworthiness of the vessel. The allegations of negligence and unseaworthiness as charged in the libel are not sustained

by the evidence. Therefore, Libelant is not entitled to recover damages."

These findings are the basis of the Trial Court's decision, and they are amply supported by the evidence.

Thurston himself testified that as third assistant engineer he stood a four hour watch twice a day, and "I had charge of the engine room for four hours and eight hours off and then four hours on." (Tr. 4). He assumed all the regular duties of third assistant engineer (Tr. 20). The oiler and fireman on his watch were subject to his orders (Tr. 22). It was his responsibility to maintain safe working conditions (Tr. 23). And to inspect and make rounds of the engine room (Tr. 24, 26). And it was his duty to know if there was accumulated oil or water over the tank tops at the bilge suction (Tr. 30).

Edmonston, the Chief Engineer, testified—"The engineer on watch is responsible for all the machinery and everything down below in the engine room and the fire room." (Tr. 75). It is the duty of the engineer on watch to make "a thorough inspection of all machinery before taking over the watch and a round of inspection at least every thirty minutes thereafter." (Tr. 75). And "he has to maintain safe working conditions at all times." (Tr. 76).

Thus the Trial Court's Findings and Conclusion that Libelant was injured solely through his own failure to make adequate inspection of the engine room are fully supported by the evidence.

All the testimony in the case was in open court. As the Trial Court saw and heard the witnesses, its Findings should not be set aside unless clearly erroneous. *U. S. A. v. Wilhite,* 163 F. (2d) 825, (Ninth Circuit 1947), *Vileski v. Pacific Atlantic S.S. Co.,* 163 F. (2d) 553, 554 (Ninth Circuit 1947). And see the cases listed in the Appendix to *Petterson Lighterage & T. Corp. v. New York Central,* 126 F. (2d) 992 (Second Circuit 1942).

The present case is ruled by the doctrine that when it is the duty of libelant himself to maintain a safe place in which to work, he cannot recover for injuries resulting from his own failure to do so.

Asprodites v. Standard Fruit & Steamship Co., 108 F. (2d) 728 (Fifth Circuit 1940).

This was a suit brought under the Jones Act for the death of a ship's engineer who died from burns from an explosion of a steam pipe. The Court affirmed a directed verdict for defendant, and pointed out that deceased had been the engineer on duty at the time of the accident:

> "As engineer, the deceased was charged with the duty to see that the boiler, steam pipes, manifold, and cut-off valves were properly operated, inspected, and cared for while he was on duty."

The Meteor, 1939 A.M.C. 367 (U. S. District Court, Western Dist. Wash.). Suit in admiralty for personal injuries sustained by engineer when he slipped on oily deck. The Court said:

> "The court judicially knows that it was the duty of libelant, as engineer, to function in the interest of efficiency and safety for himself as well as for others; the court also knows that oil and grease are necessary in the performance of engineering duties, and necessarily must drop upon the floor of the department. It was the duty of the engineer to keep the department reasonably clear and clean of accumulation of oil, and to use such necessary agencies available—mats, canvas, etc.—if needed, in the interests of safety. His failure to do so, unless otherwise excused, may not be the basis for such claim as made." (citing cases).

Watterson v. U. S. A., 1934 A.M.C. 145 (U.S. District Court, Southern Dist. N. Y.). Cook slipped on greasy floor of galley. The Court said:

> "In the second place, I cannot find any breach of duty on the part of the respondent or of its other employees, because even if the grease had been there for a day or two, it was clearly the duty of the libelant as well as that of anyone else to remedy this condition and to keep the floor clean."

Battice v. U. S. A., W. S. A., 79 Fed. Supp. 932, 1948 A.M.C. 1019 (U. S. District Court, Southern District, N. Y.). A recent case decided April 16, 1948. Chief steward, on going into icebox, was struck by a cake of ice which slid off top of a pile of ice. Recovery was denied. The Court said:

> "It is clear to me that Battice failed to sustain his burden of proof on the claim of negligence. He was responsible for the proper stowage of the ice box, and the evidence makes it obvious that he completely controlled access to the box. Battice did not even pretend to know who was responsible for leaving ice in such condition that it could be disturbed by the motion of the ship. But the sole

responsibility for proper stowage was his, and it was his negligence that was the proximate cause of the accident. I do not accept his suggestion that perhaps a messman violated his instructions. Even had he sustained this guess by proof, which he did not, the fact would still remain that it was Battice's duty to see to it that the ice box was at all times a safe place in which to work, and his violation of his own duty was thus the proximate cause, and the only proximate cause, of the damage. Were it relevant I would, of course, find that the conduct of Battice in failing to take precautions for his safety when he saw the condition of the box (as he should have) was contributory negligence as a matter of law. But the question of contributory negligence does not arise since the carelessness of Battice, himself, was, as I have said, the only producing cause of the accident."

Cf. Vileski v. Pacific Atlantic S.S. Co., 163 F. (2d) 553 (Ninth Circuit 1947).

Appellant urges that the employer's duty to maintain a safe place to work is "non-delegable". That is of course true, in the sense that an employer cannot escape liability to employee A by showing that the duty had been delegated to employee B. But none of the cases cited by appellant involve the situation where the very employee whose duty it is to maintain a safe place to work is injured through his own failure to perform the duty. The distinction is clearly pointed out in *U. S. Steel Products Co. v. Noble,* 10 F. (2d) 89 (Second Circuit 1925).

That was also a suit by a third assistant engineer brought under the Jones Act. The Court said:

"As against another employee, the employer may not delegate the duty of keeping in reasonably safe

> condition the essential appliances; but the employee charged with the very duty of so keeping them cannot make his own neglect of that duty the basis of a claim against his employer."

This point becomes most clear if we suppose that one of the oilers or firemen on Thurston's watch had fallen into the hole in the floor plates. In such a case, counsel for the seaman could argue most forcefully that the accident was due to the negligence of his superior officer, the engineer on duty, to properly inspect the engine room and maintain safe working conditions. But here, as Thurston himself was injured, he cannot recover for his own failure to do so.

We now comment on a few matters urged in Appellant's brief.

It is suggested that Thurston was too busy working on the generators, and didn't have time to make routine inspections of the engine room. But the Trial Court's finding is contrary. Edmonston testified that there was no hurry about the generators, and such work should not interfere with the duty to "make your routine round of inspections every thirty minutes" (Tr. 121-122). And Thurston in his testimony did not qualify his admissions that it was always his duty to inspect and make rounds of the engine room, and see that working conditions were safe (Tr. 23, 24, 26, 30). And he recognized this duty on the day he was hurt (Tr. 131, 132).

It is claimed that the engine-room floor was slippery from excessive oil and grease in the vicinity where the floor plate was removed (Appellant's Brief p. 16). But again the Trial Court's findings are contrary. Edmon-

ston, the Chief Engineer, testified positively that "The floor plates were clean", and "There was no excessive oil or grease". (Tr. 80). And on cross-examination "there was no oil or grease near there". (Tr. 118) Thurston's testimony is unconvincing. He first said the floor was greasy and he slipped (Tr. 7, 8). But at another point he doesn't mention slipping, but says "I just stepped around and he started getting the pump going good and I reached up to turn the water on deck and I *fell* in the bilge". (Tr. 18). He told the Public Health Service he "stepped into bilge" (Exhibit 4).

In any event, here again, if the floor plates *had* been *dangerously slippery,* it was Thurston's duty as engineer on watch to have the condition remedied. *The Meteor,* 1939 A.M.C. 367; *Watterson v. U. S. A.,* 1934 A.M.C. 145; *Battice v. U. S. A.,* 79 Fed. Supp. 932, 1948 A.M.C. 1019; *Asprodites v. Standard Fruit & S.S. Co.,* 108 F. (2d) 728; *Cf. Vileski v. Pacific-Atlantic,* 163 F. (2d) 553.

Appellant stresses the point that he was not warned in advance that there was to be a fire and boat drill that morning (Appellant's Brief p. 22). We believe the Court judicially knows that fire and boat drills are required by law to be held frequently at sea. The ship's engine room log, Exhibit 6, shows that fire and boat drill had previously been held on Thurston's watch, July 28-29. So there was nothing unusual about having such a drill at sea. But what good is a fire and boat drill if everyone is informed ahead of time when it is going to take place? Fires and emergencies don't usually give advance notice of their happening. The whole purpose

of fire and boat drills is defeated if the crew are advised ahead of time.

Point III

The award of $56 for maintenance is based on a proper rate and period of disability.

The Trial Court awarded maintenance for 14 days (August 13 to August 26, 1946) at $4 per day. Libelant claims a longer period and higher rate.

The Trial Court's finding of 14 days is fully supported by the evidence. Thurston was injured July 10. The injury consisted of broken ribs. Maintenance was allowed to a date more than six weeks after the injury. Thurston was well enough to stand his watches and do routine engine room work on the return voyage (See Log entries from July 23 to August 9 in Exhibit 6). He was declared fit for duty on August 26, 1946 by the U. S. Public Health Service doctors (Exhibits 8 and 9). The fractures were then well healed (Exhibit 4, 8). True, he did not take a permanent job at sea until he joined the SS FLYAWAY about November 24, 1946 (Tr. 11). But the reason he didn't work steadily during the interim was because there was a maritime strike from September 12 to November 23, 1946 (Tr. 126). No doctor told him not to work (Tr. 40), but he was advised by the Union not to work (Tr. 41). And he stood picket duty during the strike (Tr. 41, 42). Therefore, the Trial Court's finding that Libelant's disability extended to August 26, 1946 is fully supported.

As to rate of maintenance, Libelant furnished no proof of his living expenses. The Trial Court, handling numerous seamen's suits for maintenance, judicially knows the usual rates. The current rate for maintenance at the time of the injury, and during libelant's disability, as established by the U. S. Maritime Commission, was $3.50 per day for unlicensed men, and from $4.00 to $6.00 a day for licensed men up to and including the Chief Engineer and Captain. Libelant was serving as third assistant engineer, and under these circumstances the Trial Court adopted the $4 rate established by the U. S. Maritime Commission.

Libelant's testimony that the "contract rate of maintenance" is $6 per day refers to what steamship companies, under contract with the Union, pay to seamen during the time they are employed on vessels while in port, but the vessel is not furnishing lodging and meals on board, and the seamen therefore have to go ashore for each meal (Tr. 17, 45). This is not the same as maintenance in the legal sense of the seaman's allowance for subsistence when because of illness or injury he has had to leave the service of the ship.

CONCLUSION

As libelant was the engineer on watch, and had been on watch for more than two hours before he was hurt, it was clearly his duty to inspect the engine room and see that the floor plates were in safe condition, not only

for himself, but for the oiler, fireman, and wipers also on duty under his supervision, and to maintain such safe conditions. He cannot recover damages resulting from his own failure to perform this duty. The Trial Court's Findings are fully supported by the evidence, and the Trial Court's decree should be affirmed.

Respectfully submitted,

HENRY L. HESS,
United States Attorney,

FLOYD D. HAMILTON,
Assistant United States Attorney,

Proctors for Appellee, United States of America.

WOOD, MATTHIESSEN & WOOD,
ERSKINE B. WOOD,
1310 Yeon Building,
Portland, Oregon,

Of Counsel for United States of America.